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Nos. 03-334 and 03-343

In the
Supreme Court of the United States

SHAFIQ RASUL, *et al.*,
Petitioners,

v.

GEORGE W. BUSH, *et al.*,
Respondents.

FAWZI KHALID FAHAD ABDULLAH AL ODAH, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF ALABAMA, OHIO, TEXAS, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba?

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INTEREST OF AMICI CURIAE

The States of Alabama, Ohio, Texas, and Virginia submit this Brief as amici curiae under Supreme Court Rule 37.4, in support of the United States and its officials who are named as Respondents in these cases. These cases arise from the detention at the Guantanamo Bay Naval Base of foreign nationals captured by American and Coalition military forces engaged in military operations in Afghanistan. The foreign-national detainees seek to challenge the bases for their detention in the federal courts through pleadings that have been treated as petitions for habeas corpus.

Notwithstanding the fact that the detainees are in the custody of the Government of the United States, the amici States have a compelling interest in the outcome of this case. First, they have an interest in the successful prosecution and swift resolution of the war on terrorism, of which the operations in Afghanistan are unquestionably a part. The Constitution vests the power to direct and control military operations in the political branches, and judicial interference may adversely affect the outcome of ongoing operations.

Second, citizens of the amici States serve on active duty as soldiers, sailors, airmen, and Marines, and in the Reserve and National Guard components of our armed forces. The members of the National Guard, in particular, constitute a State militia under the command of the Governor that has been mobilized for federal service and deployed. The 20th Special Forces Group of the Alabama Army National Guard, which has its headquarters in Birmingham, Alabama, for example, deployed to and served in Afghanistan and elsewhere. The States have an interest in their soldiers' performance of their military missions and their safe return.

Furthermore, those soldiers have been trained in and observe the law of war. The amici States contend (i) that the confinement of these foreign national detainees is consistent with the law of war, and (ii) that the best way to encourage compliance with the law of war is to confer its benefits on those who comply with it and to deny its benefits to those who do not.

STATEMENT OF THE CASE

In response to the attacks of September 11, 2001, for which the al Qaeda terrorist network claimed credit, American forces deployed to Afghanistan and dethroned the Taliban government that had harbored al Qaeda. Following those attacks and pursuant to its powers under Article I of the Constitution, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks ... or harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. 107-40, § 2(a), 115 Stat. 224, 224 (2001). The President then exercised his constitutional powers as Commander in Chief of the nation's armed forces and, among other things, ordered selected reserve units and selected individual ready reserve soldiers to active duty and deployed them to Afghanistan. *See* 10 U.S.C. § 12304. There, they undertook military operations that toppled the Taliban government and put al Qaeda operatives to flight. Petitioners and others were detained in the course of those operations and are currently confined at the Guantanamo Bay Naval Base on Cuba.

According to press reports, some 650 individuals are confined at Guantanamo. Other suspected terrorists and enemy combatants have been detained at Bagram Air Force Base outside Kabul in Afghanistan, on Diego Garcia

in the Indian Ocean, and elsewhere. The Guantanamo detainees come from a variety of countries, including, but not limited to, Afghanistan, Saudi Arabia, Yemen, Pakistan, Jordan, Egypt, Kuwait, Britain, and Australia. Daly, *Revealed: The Nationalities of Guantanamo*, Feb. 4, 2004.[1] Daly writes, "Camp Delta also holds seven Arab men handed over to U.S. authorities in Bosnia, as well as five individuals arrested in Malawi last summer." *Id.* As Daly observes, this variety illustrates "the global metastasizing of terrorism." *Id.*

The *al Odah* Petitioners are Kuwaitis who allege that they were volunteers providing humanitarian aid in Afghanistan and Pakistan. Local villagers seeking bounties allegedly turned them over to United States forces. The *Rasul* Petitioners include two British citizens and an Australian. They also allege that they were in Afghanistan or Pakistan for benign purposes. *See Al Odah v. United States*, 321 F.3d 1134, 1136 (D.C. Cir. 2003).

Petitioners' claims, which must, of course, be taken as true, should nonetheless be placed in perspective. First, Petitioners represent only a small number of those initially detained in Afghanistan. According to the Department of State's Legal Advisor, William Taft, more than 10,000 detainees were screened in Afghanistan, and the "vast majority" were released. See William Taft, *Guantanamo Detention is Legal and Essential*, Financial Times, January 12, 2004, at p. 19. Taft explained that American policy "was, and is, that only enemy combatants who pose special security, intelligence or law enforcement concerns are transferred to Guantanamo." *Id.* Second, Guantanamo is not the only location at which foreign

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[1] Available at http://www.upi.com/view.cfm?StoryID=20040 204-051623-5923r.

nationals captured in connection with the hostilities are in custody. Others are detained outside the United States subject to American custody at Bagram Air Force Base, on Diego Garcia, and elsewhere. Third, at least two of the Guantanamo detainees have been charged with serious national security criminal offenses. Ibrahim Ahmed Mahmoud al Qosi of Sudan and Sulayman al Bahlul of Yemen, both of whom have been accused of serving as bodyguards for Osama bin Laden, have been charged with conspiracy to commit war crimes and will be tried before military commissions. Taylor, *Al Qaeda Suspects Will Face Tribunals*, The Washington Times, February 25, 2004.[2] Finally, according to the Pentagon, eighty-eight detainees have been released, and 12 more have been turned over to authorities in their respective countries. *Guantanamo Prisoners Turned Over To Russia*, Associated Press, March 1, 2004.[3] According to the Pentagon, "[t]he decision to transfer or release a detainee is based on many factors, including whether the detainee is of further intelligence value to the United States and whether he poses a threat to the United States." *Id.*

SUMMARY OF ARGUMENT

Even as American and Coalition forces remain engaged in operations in Afghanistan and Iraq, aliens who were captured in the war zones in Afghanistan and are now detained at Guantanamo Bay Naval Base in Cuba seek to challenge their confinement in federal court. This Court has historically deferred to the military, particularly in times of war. This Court has further emphasized that conditions of war may remain even after

[2] Available at http://www.washingtontimes.com/functions/print.php?StoryID=20040224-115145-8590r.

[3] Available at http://www.al.com/printer/printer.ssf?/base/ politics-2/107815704617-1780.xml?aponline.

principal military operations have concluded. In *Johnson v. Eisentrager,* 339 U.S. 763 (1950), for example, this Court concluded that the claims of German nationals captured in China, convicted of furnishing intelligence information to enemies of the United States, and confined at Landsberg Prison in Germany had no right to invoke the writ of habeas corpus. Any complaints regarding observance of the Geneva Conventions were for the political and military authorities to resolve. *Id.* at 789 n.14; *see also Ludecke v. Watkins,* 335 U.S. 160 (1948). So, too, here, this Court should defer to the military and political authorities.

Deference is appropriate because gauging the consequences of judicial intrusion into ongoing military operations is outside the role and beyond the institutional competence of the federal courts. Petitioners were detained because, in the judgment of military experts and those in the policymaking branches, they posed a clear and present danger to American and Coalition forces and threatened the successful conclusion of the war on the al Qaeda terrorists in Afghanistan. They were removed to a site far from the field of battle, where they are safe from the danger of continued fighting and no longer present a threat to American and Coalition forces. These battlefield decisions should not be second-guessed by the federal courts, particularly when military operations have not yet concluded in Afghanistan.

ARGUMENT

1. This Court should defer to the Executive and Legislative branches in the conduct of military operations.

The Constitution unambiguously assigns the power to raise and deploy the armed forces to the Executive and Legislative branches. The President is

denominated "Commander in Chief" and thereby empowered to direct the operations of the armed forces. U.S. Const. art. II, § 2, cl. 1. Congress is empowered to give the President the tools he or she needs; it can raise, support, and govern the armed forces and declare war. U.S. Const. Art. I, § 8, cls. 11, 12, 13, 14. This Court has recognized that these powers are "plenary." *See Solorio v. United States,* 483 U.S. 435, 441 (1987) ("[T]here is no indication that the grant of power in [art. I, § 8, cl. 14, to regulate the Armed Forces] was any less plenary than the grants of other authority to Congress in the same section."); *Chappell v. Wallace,* 462 U.S. 296, 301 (1983) ("explicit grant of plenary authority to Congress"). The military operations in Afghanistan reflect this constitutional allocation of power. Congress authorized the President to use "all necessary and appropriate force" to respond to the September 11, 2001 attacks, and the President sent American military forces to Afghanistan where forces from other Coalition countries joined them.

As the Question Presented itself states, Petitioners were "captured abroad in connection with hostilities." Petitioners' complaints are with the decisions of American military commanders to capture and detain them. These decisions were – and are – made in the field and reflect a military judgment that the detention of Petitioners and their removal from Afghanistan would advance the prospect of success of the mission and the safety of their soldiers. The detention decisions of the field commanders were reviewed and approved according to the chain of command and, further, by officials in the Departments of Defense and Justice. This Court should defer to the military commanders' exercise of their expert professional judgment, particularly while American and Coalition forces are still actively engaged in hostilities.

Deference in this case is consistent with this Court's deference to military officials' judgments concerning other issues, ranging from the raising of armies to the command structure to uniforms. In *Rostker v. Goldberg,* 457 U.S. 57 (1981), for example, which involved registration with the Selective Service, this Court observed, "This case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference." *Id.* at 64-65; *see also id.* at 70 ("[J]udicial deference ... is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.") Similarly, in *Chappell v. Wallace,* this Court unanimously held that enlisted sailors could not sue their superior commissioned and noncommissioned officers for injuries sustained as a result of alleged violations of their constitutional rights in the course of military service. This Court stated, "Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers ..." 462 U.S. at 300; *see also United States v. Stanley,* 483 U.S. 669 (1987). Likewise, in *Goldman v. Weinberger,* 475 U.S. 503 (1986), this Court deferred to the "considered professional judgment" of the Air Force regarding the need to standardize uniforms and subordinate personal sartorial preferences to unit cohesion. *Id.* at 508.[4] Finally, in *Greer v. Spock,* 424 U.S. 828 (1976), and

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[4] This Court's decision in *Goldman*, of course, was subsequently overruled by Congress in Pub. L. No. 100-180 (codified at 10 U.S.C. § 774), which presumptively permits the wearing of religious apparel by members of the armed forces. Congress' action illustrates precisely the point the amici States make here: that decisions concerning military matters are left to the policymaking branches.

Brown v. Glines, 444 U.S. 348 (1980), this Court sustained against First Amendment challenges to Army and Air Force regulations that limited the distribution of literature on military bases. In so doing, this Court deferred to the judgment of commanders charged with ensuring the readiness of the units under their command.

These instances of deference to military authorities rest on this Court's acknowledgment that the powers and abilities of the Judicial Branch – particularly as they pertain to military and national security issues – are limited. As this Court has stated:

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive branches.

Gilligan v. Morgan, 413 U.S. 1, 10 (1973); *see also Chappell*, 462 U.S. at 305 ("[C]ourts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority may have.") (quoting Warren, The Bill of Rights and the Military, 37 N.Y.U. L. Rev. 181, 187 (1962)). In a similar vein, this Court has recognized that "[c]ongressionally uninvited intrusion into military affairs is inappropriate," because it can have dangerous and unforeseen consequences. *Stanley*, 483 U.S. at 683.

Deference that is appropriate with respect to military discipline, uniforms, and speech is all the more appropriate when, as here, the challenge is to a battlefield decision made in time of active hostilities. Indeed, the

very policy underlying deference in peacetime – the need to ensure that the military can perform its mission when it deploys, *see Brown v. Glines*, 444 U.S. at 354 – demonstrates *a fortiori* the need for wartime deference.

Recognizing the dangers posed by uninvited intrusion in military affairs, the courts have rightly hesitated to interfere with military operations at the time of deployment. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), this Court observed:

> Certainly, it is not the function of the Judiciary to entertain private litigation – even by a citizen – which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.

Id. at 789. Any complaint about the deployment of American armed forces to a foreign country "involves a challenge to the conduct of diplomatic and foreign affairs, for which the President is exclusively responsible." *Id.* The lower courts have also deflected challenges to the deployment of American forces, finding the claims nonjusticiable for various reasons. *See, e.g., Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003) (Iraq); *Conyers v. Reagan*, 765 F.2d 1124 (D.C. Cir. 1985) (Grenada); *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983) (El Salvador), *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999) (Yugoslavia); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (Iraq).[5] The restraint shown by the courts illustrates an awareness of the hazards that judicial intervention into military affairs poses.

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[5] This Court's decision in *Perpich v. Department of Defense*, 496 U.S. 334 (1990), likewise has the effect of deflecting a Governor's challenge to the mobilization and deployment of National Guard units for training in Central America.

Courts have declined to intervene not only on the front-end of hostilities at the time of deployment, but on the back end as well. Indeed, courts have refused to wade into the thicket of military affairs even after hostilities seem to have concluded. In *Johnson v. Eisentrager,* this Court observed that allowing German nationals confined in Landsberg Prison in Germany after World War II was over to file petitions for habeas corpus would have pernicious effects on the military. Even then, during the "twilight between war and peace," sifting through the detainees' complaints would drain military resources. 339 U.S. at 779. More significantly, this Court emphasized that, in times of active hostility,

> Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military effort abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

Id.

Similarly, in *Ludecke v. Watkins,* 335 U.S. 160 (1948), this Court affirmed the denial of habeas corpus relief to a German national who had been interned in the United States as an enemy alien in 1942 and was ordered deported in 1946. This Court rejected the contention that

World War II had ended in 1945 with the cessation of active hostilities, such that deportation was no longer warranted. Rather, this Court stated that the determination when the war was over was "not for us," but was, instead, a "matter[ ] of political judgment for which judges have neither technical competence nor official responsibility." 335 U.S. at 170.

Again, this case likewise calls for deference to the military experts and the policymaking branches. Coalition forces remain engaged in Afghanistan; indeed, the situation today is surely hotter than that in Germany in 1948. Petitioners seek to involve the federal judiciary in the review of decisions of military commanders and the Executive branch. Those commanders took the performance of their mission and the safety of their service members into account in deciding to detain and confine Petitioners and others similarly situated. This Court should hesitate before second-guessing these military decisions, even indirectly.[6]

2. The Court of Appeals correctly concluded that Petitioners have no right to contest the legality and conditions of their

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[6] Furthermore, to the extent Petitioners seek to vindicate rights claimed under various Treaties through the writ of habeas corpus, they run head-first into, among other things, *Eisentrager.* There, this Court rejected the attempt to invoke the protection of the 1929 Geneva Convention, explaining:

> It is ... the obvious scheme of the Agreement that responsibility for observance and enforcement of these [Treaty] rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by presidential intervention. 339 U.S. at 789 n.14.

confinement outside the United States in federal court.

The D.C. Circuit correctly read *Johnson v. Eisentrager* in deciding that Petitioners have no right to invoke the habeas corpus jurisdiction of the federal courts.

As previously noted, *Eisentrager* arose from petitions for habeas corpus filed by German nationals captured in China at the end of World War II, tried and convicted by a military commission, and detained at Landsberg Prison in Germany. They sought habeas corpus review of the circumstances of their confinement and release from prison. This Court observed,

> We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an enemy alien who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.

339 U.S. at 768. This court squarely declined to create a right of habeas corpus review for "enemy aliens, resident, captured and imprisoned abroad." *Id.* at 777. Instead, it held that the federal courts lacked jurisdiction to consider the enemy aliens' petitions.

Significantly, the *Eisentrager* Court distinguished between resident and nonresident enemy aliens. Resident enemy aliens are subject to arrest, internment, and deportation, with any judicial review limited to the existence of a state of war and the fact of alien status. 339 U.S. at 775 (citing *Ludecke v. Watkins*). A nonresident alien does not have even "this qualified access to our courts, for he neither has comparable claims

upon our institutions nor could his use of them fail to be helpful to the enemy." *Id.* at 776. The nonexistent rights of nonresident enemy aliens could not be squared with their demand for access to the United States courts:

> We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were in any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.

339 U.S. at 777-78. Ultimately, the *Eisentrager* Court held that the challenge to the conditions of confinement was for the political and military authorities, not the courts, to resolve. *Id.* at 789 n.14.

Subsequently, in *United States v. Verdugo-Urquidez,* 494 U.S. 259 (1990), this Court held that the Fourth Amendment did not apply to the search and seizure by United States agents of property owned by a nonresident alien and located outside the United States. Citing *Johnson v. Eisentrager,* this Court emphasized the "significant and deleterious consequences" that would accompany any extension of the Fourth Amendment's protections to property owned by foreign nationals located in foreign countries. 494 U.S. at 273. This Court concluded, "For better or worse, ... [i]f there are to be restrictions on searches and seizures which occur [outside our borders] incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation." *Id.*

The D.C. Circuit correctly applied *Johnson v. Eisentrager* and *Verdugo-Urquidez* in rejecting Petitioners' attempt to invoke the habeas corpus jurisdiction of the federal courts. As the D.C. Circuit said, "We cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not." *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C.Cir. 2003). Furthermore, it makes no sense to interfere with military decision-making after having recognized the dangers of doing so. For example, in this case, the *al Odah* Petitioners may wish to confront the Afghan and Pakistani villagers who allegedly sold them out notwithstanding the good they were doing. In addition, they may wish to confront the commanders who participated in the decision to detain them. In the end, no matter what the process is called, it threatens intrusion into military functions.

3. Confinement of the detainees complies with the law of war and is consistent with the national security interests of the United States.

In pertinent part, the 1949 Geneva Convention relative to prisoners of war defines prisoners of war as persons who have fallen into the hands of the enemy and fit within one of the following two categories:

> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to a conflict and operating in or outside their own territory,

> even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.

See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(a)(1)-(2), 6 U.S.T. 3316, 75 U.N.T.S.135. The driving force behind these criteria is the need to distinguish enemy combatants from the civilian population. The armed forces, militia, and volunteer corps referred to in subsection (1) are presumptively distinguishable from civilians, while the militia, volunteer corps, and organized resistance movements in subsection (2) are presumptively not and, as a result, must satisfy the stated criteria to be treated as prisoners of war.

The detainees here do not qualify for treatment as prisoners of war.[7] At the outset, they claim not to be combatants at all. More generally, however, they did not

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[7] Even if they did, custom and practice would allow for their detention until the end of the hostilities. That is what happened with Americans captured by the Germans and Japanese during World War II as well as Germans captured by U.S. Forces, some of whom were confined in Alabama.

meet the criteria of article 4(a)(2). As Secretary of Defense Rumsfeld has explained:

> The determination that Taliban detainees do not qualify as prisoners of war under the convention was because they failed to meet the criteria for POW status.
>
> A central purpose of the Geneva Convention was to protect innocent civilians by distinguishing very clearly between combatants and noncombatants. This is why the convention requires soldiers to wear uniforms that distinguish themselves from the civilian population. The Taliban did not wear distinctive signs, insignia, symbols or uniforms. To the contrary, far from seeking to distinguish themselves from the civilian population of Afghanistan, they sought to blend in with civilian non-combatants, hiding in mosques and populated areas. They were not organized in military units, as such, with identifiable chains of command; indeed, al Queda forces made up a portion of their forces.

Rumsfeld, U.S. Senators Brief Media at Guantanamo Bay, United States Mission to the European Union, January 27, 2002.[8] Because they do not satisfy the criteria, the detainees are not entitled to be treated as prisoners of war.[9]

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[8] Available at http://www.useu.be/Terrorism/USResponse/Jan2702RumsfeldSenatorsGuantanamo.html.

[9] Petitioners' request for a hearing by an Article 5 tribunal to resolve doubts regarding their status fails because those claims assert rights under a treaty that is not self-executing, and entail the same practical difficulties that a habeas corpus petition does.

In contrast, the soldiers, sailors, airmen, and Marines of the amici States satisfy the criteria. They constitute an organized armed force with a clear chain of command. They wear uniforms, and they carry arms openly. Moreover, they are trained in the law of war, and Judge Advocates accompany units in the field. The Judge Advocates provided legal advice to commanders on a variety of issues, including those relating to the application of the law of war. Reserve and National Guard Judge Advocates have deployed as well. An Assistant United States Attorney from the Middle District of Alabama and an Assistant Attorney General of Alabama, for example, deployed to Kuwait with the 226th Area Support Group as that unit's Judge Advocates. The point here is that American forces, honor the law of war.

In the view of the amici States, compliance with the law of war should be rewarded, and non-compliance should not. Giving Petitioners the benefit of prisoner of war status even when they do not satisfy the definition of a lawful combatant gives them no incentive to satisfy the definition. More to the point, al Qaeda terrorists will find noncompliance with the criteria of Article 4 to be in their interest because it will allow them to move among the civilian populace without detection. Thus disguised, they target not only civilians but also Coalitian Forces, who can readily be identified as such because, among other things, they wear uniforms and carry arms openly in compliance with the Geneva Convention. Al Qaeda's

operatives' willful noncompliance with the laws of war must come with consequences.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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